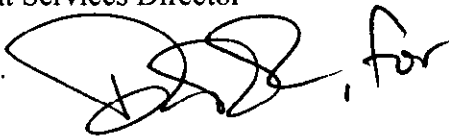


BOARD OF COUNTY COMMISSIONERS

INTER-OFFICE MEMORANDUM

To: Kim Dressel, Management Services Director

From: Herbert W.A. Thiele, Esq.  for
County Attorney

Date: June 30, 2006

Re: Bank of America Building; Procedure for Potential Lease Activities at Expiration
of Downtown Babies Lease

This memorandum responds to your request for our opinion regarding the various statutory requirements to be followed in leasing the space at the Bank of America Building ("BOA Building") currently occupied by Calhoun Street Downtown Babies, Inc. ("Downtown Babies"). It is our understanding that the Downtown Babies space comprises three separate areas: (i) a 2,000 sq. ft. office space located on the street level of the BOA Annex (Suite 100X); (ii) a 1,465 sq. ft. space located on the basement level of the BOA Annex (Suite 00L); and (iii) a 3,000 sq. ft. outside area adjacent to the BOA Annex used by Downtown Babies as an outdoor play space in the operation of its child care facility (the three areas will be collectively referred to herein as the "Downtown Babies Space"). According to the information provided to our office, the Downtown Babies Space will be available for lease at the expiration of the Suite 00L lease on March 31, 2007.

Policy/Statutory Requirements and Exceptions

BCC Policy No. 03-01 - Leasing of County Real Property and BOA Real Property:

The leasing of any real property owned by the County is governed by BCC Policy No. 03-01, Approval Authority for the Acquisition, Disposition, and Leasing of Real Property (the "Real Estate Policy"). As provided in paragraph 6(d)(i) of the Real Estate Policy, "[t]he conveyance of any leasehold interest or other right of possession of any real property owned by the County shall be transacted in accordance with Section 125.35, *Florida Statutes*, as may be amended from time to time, unless the conveyance is exempted therefrom pursuant to either Section 125.38 or Section 125.39, *Florida Statutes*."

The Real Estate Policy also includes provisions intended specifically for leasing activities at the BOA Building. Section 6(d)(ii) requires that "[t]he conveyance of any leasehold interest or other right of possession of any part of the BOA shall be completed in accordance with and subject to the limitations of Section 6(e), BOA Real Property." Under Section 6(e), the County Administrator has the authority to approve lease agreements at the BOA Building in which the rental rate is no less than 90 percent of the Fair Market Rent and the term is no longer than three

years with renewals of no more than three years. Any lease agreements in which the terms exceed those limits are subject to Board approval.

Thus, the Board, through its Real Estate Policy, has directed that any leasing activity at the BOA Building must be conducted in accordance with *Fla. Stat.* §125.35, unless any of the exceptions in *Fla. Stat.* §§125.38 and 125.39 are applicable. In addition, any leases for less than 90 percent of Fair Market Rent and/or for a term of more than three years are beyond the County Administrator's approval authority and must be specially considered by the Board for approval. The County Administrator, as directed in the Real Estate Policy, has developed written procedures to assure that the leasing activities at the BOA Building are carried out in accordance with the statutory requirements. A review of these statutory requirements and exceptions are provided as follows.

Section 125.35 - advertised notice of lease to the highest and best bidder:

Fla. Stat. §125.35 prohibits the Board from selling or leasing County-owned property unless a notice of sale or lease is advertised once a week for at least two weeks calling for bids for the purchase or lease of such County-owned property. Upon advertising such notice and receiving bids, the Board is authorized to sell or lease the County-owned property to the highest and best bidder.

Section 125.39 - exception for County property acquired with reversionary clause:

Fla. Stat. §125.39 provides for an exception from the advertised bid requirement for the sale or disposition of a County property which was originally conveyed to the County for a specific purpose with a reversionary clause whereby the County-owned property reverts to the grantor upon the County's failure to use the property for such purpose. The County's acquisition of the BOA Building was not such a conveyance and, therefore, this exception is not applicable to the any leasing activities at the BOA Building.

Section 125.38 - exception for use by governmental entity or nonprofit corporation for public or community interest and welfare:

Fla. Stat. §125.38 provides for an exception from the advertised bid requirement for the sale or disposition of a County property to a governmental entity or to a nonprofit corporation under circumstances which satisfy the specific criteria set forth in the statute, as follows (the "§125.38 Exception"):

If the United States, or any department or agency thereof, the state or any political subdivision or agency thereof, or any municipality of this state, ***or corporation or other organization not for profit which may be organized for the purposes of promoting community interest and welfare***, should desire any real or personal property that may be owned by any county of this state or by its board of county commissioners, ***for public or community interest and welfare***, then the United States, or any department or agency thereof, state or such political subdivision, agency, municipality, corporation or organization may apply to the board of county commissioners for a conveyance or lease of such property. Such board, ***if satisfied that such property is required for such use and is not needed for***

county purposes, may thereupon convey or lease the same at private sale to the applicant for such price, whether nominal or otherwise, as such board may fix, regardless of the actual value of such property. *The fact of such application being made, the purpose for which such property is to be used, and the price or rent therefor shall be set out in a resolution duly adopted by such board.* In case of a lease, the term of such lease shall be recited in such resolution. No advertisement shall be required. (emphasis added)

Thus, in order for the §125.38 Exception to be applicable to any leasing activity at the BOA Building, the proposed lease must satisfy each of the following criteria:

1. the prospective lessee must be either:
 - a. a governmental entity as recognized in the statute; or
 - b. a nonprofit corporation, or other such nonprofit organization, which is organized for the purposes of promoting community interest and welfare;
2. the proposed use of the leased space must be for public or community interest and welfare;
3. the leased space must be required for the proposed use; and
4. the leased space must not be needed for any County purpose.

Upon the Board's finding that a proposed lease meets each of these criteria, it must adopt a resolution which includes, at a minimum, the fact that such application to lease the space has been made, the purpose for which the leased space will be used, the amount of rent to be paid for the leased space, and the term of the lease. After adopting such resolution, the Board would be authorized under the §125.38 Exception to lease space in the BOA Building directly to such government entity or nonprofit corporation without the need for an advertised bid.

**Applicability of §125.38 Exception to Lease of Space to
Downtown Babies Child Care Operation**

It is our understanding that Downtown Babies has expressed an interest in remaining in the Downtown Babies Space pursuant to a new lease. In addition, Downtown Babies apparently takes the position that its child care operation, as a nonprofit corporation organized for the purposes of promoting community interest and welfare, is exempt under the §125.38 Exception from the advertised bid requirement for the lease of County property. Based on the information provided to our office, and our research on any applicable Florida law, we have the following opinion regarding the applicability of the §125.38 Exception to the Downtown Babies child care operation.

Downtown Babies Purpose of Organization:

According to the Articles of Incorporation for Downtown Babies, it is a nonprofit organization exempt from income tax under Section 501(c)(3) of the Internal Revenue Code. It was organized in February 1996 for the purpose of providing an employer-sponsored child care center for the

tenants of the BOA Building (formerly known as the Barnett Bank Building), and other employers, and has been open to the general public since its inception. In its 2004 tax return, Downtown Babies stated as its primary exempt purpose, "Employer Sponsored Childcare", and described its exempt purpose achievements as, "provid[ing] employer sponsored childcare center for the downtown Tallahassee, Florida area as well as the general public." In explaining how its income-generating activities contributed importantly to the accomplishment of its exempt purposes, Downtown Babies stated in its 2004 tax return that it provides childcare for working parents in the downtown Tallahassee area thereby enabling the children to get quality childcare and providing the parents an opportunity to visit with their children during the working day.

Based on this information, it appears that the purpose for which Downtown Babies was organized focuses on two factors: (i) providing employer-sponsored child care for the tenants of the BOA Building and other businesses in the downtown Tallahassee area, and (ii) providing an opportunity for parents working in the downtown Tallahassee area to enroll their children at the Downtown Babies facility and visit them during their work day. Apparently, it is Downtown Babies' position that its nonprofit corporate organization and its child care operation would be construed to be organized for the purposes of promoting community interest and welfare, thereby entitling it to be considered under the §125.38 Exception.

Florida Law Applicable to §125.38 Exception:

In the absence of any Florida Appellate Court opinions, the only guidance in interpreting the use of the §125.38 Exception is found in two Attorney General Opinions. In AGO 74-219, the Attorney General reviewed the use of the §125.38 Exception by Seminole County to lease County land to a nonprofit corporation for little league baseball use. The Attorney General concluded that, "[w]hen the purpose of a lease of county land is itself a legitimate county purpose or is consistent with and furthers a county purpose to which the land has already been dedicated, s. 125.38 should be read as allowing such a lease if the county commissioners determine that the land is not otherwise needed for county purposes." Furthermore, in AGO 81-11, the Attorney General concluded that, "[c]entral to the requirements of s. 125.38, F.S., is that the board of county commissioners must make a determination that the proposed lease of county property will serve the public or community interest and welfare, and that such property is not needed for county purposes." In addition, the Attorney General pointed out that, "[t]he board of county commissioners has the power to determine and declare what are public uses for the county and to provide public places for the exercise and fulfillment of public purposes."

Thus, the applicability of the §125.38 Exception to the Downtown Babies child care operation depends, in part, on the Board's determination that the proposed use by Downtown Babies is one that, in and of itself, would be considered a County purpose that could be legitimately undertaken by the Board. If so, then the Board could lease the space to Downtown Babies without advertising it to the highest bidder, assuming all other conditions of the §125.38 Exception are satisfied.

Although the Florida Appellate Courts have never had the opportunity to interpret the meaning of "public use" under the §125.38 Exception, the Florida Supreme Court has recently addressed the issue with regard to the entitlement of a nonprofit corporation to exemption from ad valorem

taxes. In *CAPFA Capital Corp. 2000A v. Donegan*, 929 So.2d 569 (Fla. 2006), the Florida Supreme Court looked at whether CAPFA, a nonprofit corporation established by the City of Moore Haven, was entitled to an exemption for ad valorem taxes on an apartment complex property it owned and operated as a student housing facility near the campus of the University of Central Florida. The original intent of CAPFA was to charge market rents for the apartments and use any excess revenues to grant students scholarships in the form of rent reductions, although no such scholarships were ever awarded because of financial difficulties. In finding that CAPFA's student housing project did not provide a public purpose, the Court concluded that, "even if the concept that public housing fulfills an essential municipal or public purpose is currently viable, in those [public housing] cases discussed above, the projects were aimed at curing urban blight, addressing police, fire and safety issues, and helping the urban poor find decent living quarters. The project in this case was not intended to address such problems, market rents were being charged, and no need or necessity for student housing was demonstrated." The Court further concluded that, "[a]t best, it could be said that the project meets student housing needs in the university area, but without the project, other apartment projects could meet the same need and provide a similar market price." Thus, it is apparent that in order for the Downtown Babies proposed use to be construed as providing a public or county purpose, the Board should be satisfied that it is a use that is otherwise not provided or available to the general public in the downtown Tallahassee area.

According to information obtained by staff, there are several other child care centers available to the general public in the downtown Tallahassee area. In addition, staff has determined that the rates charged by Downtown Babies are in the top end of the range of rates charged by the other child care centers in the downtown Tallahassee area. Thus, as with the student housing project in the *CAPFA* case, the best that could be said about the Downtown Babies operation is that it meets child care needs in the downtown Tallahassee area, but without Downtown Babies, other child care centers could meet the same need and provide a similar market price. However, that does not necessarily mean that it meets the legal standard of providing a public purpose.

The *CAPFA* case is also helpful because it cites to a 1983 Supreme Court opinion which addressed a taxpayer action against the City of Boca Raton to enjoin the city's contribution of funds for use and operation of a child care center. In *City of Boca Raton v. Gidman*, 440 So.2d 1277 (Fla. 1983), the Florida Supreme Court looked at whether the operation of a child care center is a valid public purpose. The city's child care center was a non-profit educational child care center which provided subsidized child care services including infant nursery care, pre-school and after school programs and summer programs for disadvantaged children. The Court concluded that, "[c]onsidering the clear legislative intent that municipalities be able to provide for the poor as well as provide educational facilities, and the broad interpretation of 'municipal purpose' by the courts, there is no doubt in our minds that provision for day care educational facilities such as the Florence Fuller Child Development Center [in providing subsidized child care services for disadvantaged children] is indeed a valid municipal purpose which is rationally related to the health, morals, protection and welfare of the municipality." Thus, the Board's determination of whether the Downtown Babies proposed child care facility provides a public or county purpose is also dependent, in part, on whether it provides subsidized child care for

disadvantaged children who otherwise would not be able to participate in such child care, and on the degree to which such services are provided.

Information Required From Downtown Babies for Board's Determination of Its Entitlement to §125.38 Exception:

In order for the Board to make the determination that Downtown Babies is entitled to the §125.38 Exception and to adopt a resolution declaring such finding, it will be necessary for staff to obtain additional information from Downtown Babies. As stated above, the first two conditions of the §125.38 Exception involve the determination that Downtown Babies was organized for the purpose of promoting community interest and welfare, and that its proposed use of the space for its child care operation is for public or community interest and welfare. In addition, the third condition requires that the space must be required for Downtown Babies use. In order for the Board to make those determinations, it will be necessary for Downtown Babies to inform staff of the following:

1. In what way, and to what degree, does the Downtown Babies child care operation provide subsidized child care for disadvantaged children?
2. In what way would the child care services provided by Downtown Babies not be absorbed by the downtown Tallahassee market if Downtown Babies relocated its operation to another site in the downtown Tallahassee area or elsewhere?
3. Why would no other alternate site meet the needs of the Downtown Babies operation, i.e., why can Downtown Babies operate only out of the BOA Building site?

Unless staff is provided with this information, the Board will be left to make its determination based on the information and legal precedent set forth above. In our opinion, without additional information regarding the Downtown Babies operation, the organizational purpose of Downtown Babies as set forth in its Articles of Incorporation and 2004 tax return does not meet the court-established standard of promoting community interest and welfare. Furthermore, based on the information provided, it does not appear that the operation of Downtown Babies is one that is in the public or community interest and welfare. Thus, without additional information, the Board would be without legal precedent in adopting a resolution authorizing the §125.38 Exception for a lease to Downtown Babies. In addition, without any clear legal support for such a resolution, a lease to Downtown Babies under the §125.38 Exception would be more susceptible to a successful challenge as a contravention to the advertised bid process.

Regardless of the Board's findings concerning the first three conditions of the §125.38 Exception, the entitlement of Downtown Babies to the §125.38 Exception will also depend on the Board's finding that the Downtown Babies Space is not needed for any County purpose. Depending on the information provided by staff as to the County's needs for the Downtown Babies Space, the County's future needs for the space may not be consistent with that of Downtown Babies, and may be an obstacle in its entitlement to the §125.38 Exception.

As always, if you have any additional questions regarding this matter, please contact our office.

cc: Parvez Alam, County Administrator